

SERVED: June 17, 1993

NTSB Order No. EA-3892

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 28th day of May, 1993

_____)	
JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-10658
v.)	
)	
DAVID W. FORESMAN,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William A. Pope II, rendered on March 25, 1991, at the conclusion of an evidentiary hearing.¹ By that decision, the law judge affirmed the Administrator's 30-day suspension of respondent's commercial pilot certificate for violations of sections 91.88(c) and 91.9 of the Federal Aviation

¹An excerpt from the hearing transcript containing the initial decision is attached.

Regulations ("FAR," 14 C.F.R. Part 91).² The Administrator alleged that on March 2, 1988, while en route from University Park, Pennsylvania, to Florence, South Carolina, respondent traversed the Roanoke Airport Radar Service Area (ARSA) without first establishing two-way radio contact with Roanoke Approach Control.

In his appeal, respondent claims that the charges were not supported by a preponderance of the reliable, probative, and substantial evidence.³ We have considered the briefs of the parties and the record and conclude that safety in air commerce or air transportation and the public interest require that the Administrator's order be affirmed.

The law judge accurately identified the key issue that he was called upon to decide as, not whether a Mooney entered the Roanoke ARSA without first establishing two-way radio contact,

²Sections 91.88(c) and 91.9 (now 91.130(c) and 91.13(a), respectively) state:

§ 91.88 **Airport radar service areas.**
* * * *

(c) Arrivals and Overflights. No person may operate an aircraft in an airport radar service area unless two-way radio communication is established with ATC prior to entering that area and is thereafter maintained with ATC while within that area.

§ 91.9 **Careless or reckless operation.**

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³The Administrator has filed a brief in reply opposing the appeal.

but whether respondent's aircraft was the one observed in the Roanoke ARSA. Respondent admitted that he operated a Mooney M-20J on March 2 between University Park and Florence, but claims that he did not fly over the Roanoke area. He asserts that when he plotted his course, he chose a fairly direct line between Martinsburg and Greensboro, kept east of Lynchburg, and headed straight into Greensboro. Tr. at 111-12. According to respondent, he had the transponder and encoder on during the entire flight. Tr. at 117.

Through the testimony of five air traffic controllers, the Administrator attempted to establish that the Mooney sighted within the Roanoke ARSA on March 2, 1988, at about 2:45 p.m. was, in fact, the same aircraft piloted by respondent. The aircraft was tracked and handed off from one controller to another until Greensboro ATC identified it as N201EQ, the aircraft operated by respondent.

The first controller testified that he observed a southbound VFR target on his BRITE⁴ radar screen approximately ten miles north of Roanoke Airport. The aircraft did not have its Mode C transponder on. When the aircraft was about four miles northwest of the airport, he looked out the window, first without, then with binoculars, and identified the aircraft as a Mooney, although he could not ascertain the model, color, or registration number. The controller estimated the aircraft's altitude as

⁴BRITE is an acronym for Bright Radar Indicator Tower Equipment. Transcript (Tr.) at 12.

between 3500 and 4500 feet.⁵ He stated that there were no other aircraft nearby at the time and confirmed that no controller had granted the aircraft permission to enter the ARSA. The other controllers testified to tracking and handing off the aircraft until it ultimately was identified by Greensboro ATC.

Respondent argues there was insufficient evidence to support the allegations because the Administrator did not introduce any tapes or radar plots. This argument is faulty, as there is no prerequisite that such evidence be presented.⁶ He contends that his aircraft must have been confused with some other Mooney because he did not fly near Roanoke,⁷ and the pertinent radar plots would have supported his claim. The Administrator's case, however, was based on the testimony of five air traffic controllers and one aviation safety inspector. They provided ample evidence to sustain the law judge's decision. By accepting their statements over respondent's, the law judge made a credibility assessment, a decision that, absent "arbitrariness,

⁵The Roanoke ARSA consisted of an inner circle five miles around the airport, surface to 5,200 feet MSL, and an outer circle with a ten-mile radius, 3,800 to 5,200 feet MSL. Exhibit R-1.

⁶Cf. Administrator v. Custard, NTSB Order No. EA-3806 (1993). (The Administrator is not required to use the tower tape in his case in chief. The law judge may rely on controllers' statements and testimony.)

⁷FAA Safety Inspector Bohnke testified that he spoke with respondent on March 22, 1988, at which time respondent admitted that he flew through the Roanoke ARSA at 4500 feet, but that he thought he contacted Roanoke and had clearance to enter. Tr. at 91. Respondent admitted that, indeed, he told this to Inspector Bohnke, but explained that he had made a mistake at the time and actually had meant to say Greensboro instead of Roanoke.

capriciousness or other compelling reasons," we will not disturb. Administrator v. Pullaro, NTSB Order No. EA-3495 at 3 (1992), and cases cited therein. See also Administrator v. Miller, NTSB Order No. EA-3455 at 6 (1991); Administrator v. Smith, 5 NTSB 1560, 1563 (1986). We are satisfied that the law judge's decision was based on a preponderance of the reliable, substantial, and probative evidence.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed; and
3. The 30-day suspension of respondent's commercial pilot certificate shall begin 30 days after service of this order.⁸

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁸For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).